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IN THE SUPREME COURT OF THE STATE OF ALASKA

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Native Village of Kwinhagak	)	
	)	
Appellant,	)	
	)	
v.	)	Supreme Court No. S-18481
	)	
State of Alaska, Office of Children's Services,	)	Trial Court No. 4BE-19-00046 CN
	)	
Appellees.	)	

APPEAL FROM THE SUPERIOR COURT
FOURTH JUDICIAL DISTRICT AT BETHEL
THE HONORABLE TERRENCE HAAS, JUDGE

BRIEF OF THE APPELLANT NATIVE VILLAGE OF KWINHAGAK

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Clerk of the Appellate Courts

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Deputy Clerk

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PRINCIPAL AUTHORITIES

Alaska Constitution
Article 1
§ 1: This constitution is dedicated to the principles that all persons have a natural right to life, liberty, the pursuit of happiness, and the enjoyment of the rewards of their own industry; that all persons are equal and entitled to equal rights, opportunities, and protection under the law; and that all persons have corresponding obligations to the people and to the State.
§ 7: No person shall be deprived of life, liberty, or property, without due process of law. The right of all persons to fair and just treatment in the course of legislative and executive investigations shall not be infringed.

U.S. Code
25 U.S.C. § 1903(1)(i), Definitions
For the purposes of this Act, except as may be specifically provided otherwise, the term—(1) "child custody proceeding" shall mean and include— (i) "foster care placement" which shall mean any action removing an Indian child from its parent or Indian custodian for temporary placement in a foster home or institution or the home of a guardian or conservator where the parent or Indian custodian cannot have the child returned upon demand, but where parental rights have not been terminated; . . .

25 U.S.C. § 1915(b), Placement of Indian children
***
(b) Foster care or preadoptive placements; criteria; preferences. Any child accepted for foster care or preadoptive placement shall be placed in the least restrictive setting which most approximates a family and in which his special needs, if any, may be met. The child shall also be placed within reasonable proximity to his or her home, taking into account any special needs of the child. In any foster care or preadoptive placement, a preference shall be given, in the absence of good cause to the contrary, to a placement with—

(i) a member of the Indian child's extended family;
(ii) a foster home licensed, approved, or specified by the Indian child's tribe;
(iii) an Indian foster home licensed or approved by an authorized non-Indian licensing authority; or
(iv) an institution for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the Indian child's needs.

(c) Tribal resolution for different order of preference; personal preference considered; anonymity in application of preferences. In the case of a placement under subsection (a) or (b) of this section, if the Indian child's tribe shall establish a different order of preference by resolution, the agency or court effecting the placement shall follow such order so long as the placement is the least restrictive setting appropriate to the particular needs of the child, as provided in subsection (b) of this section. Where appropriate, the preference of

the Indian child or parent shall be considered: *Provided*, That where a consenting parent evidences a desire for anonymity, the court or agency shall give weight to such desire in applying the preferences.
(d) Social and cultural standards applicable. The standards to be applied in meeting the preference requirements of this section shall be the prevailing social and cultural standards of the Indian community in which the parent or extended family resides or with which the parent or extended family members maintain social and cultural ties.
***

Alaska Statutes
AS 47.10.087, Placement in secure residential psychiatric treatment centers
(a) The court may authorize the department to place a child who is in the custody of the department under AS 47.10.080(c)(1) or (3) or 47.10.142 in a secure residential psychiatric treatment center if the court finds, based on the testimony of a mental health professional, that

(1) the child is gravely disabled or is suffering from mental illness and, as a result, is likely to cause serious harm to the child or to another person;
(2) there is no reasonably available, appropriate, and less restrictive alternative for the child's treatment or that less restrictive alternatives have been tried and have failed; and
(3) there is reason to believe that the child's mental condition could be improved by the course of treatment or would deteriorate if untreated.

(b) A court shall review a placement made under this section at least once every 90 days. The court may authorize the department to continue the placement of the child in a secure residential psychiatric treatment center if the court finds, based on the testimony of a mental health professional, that the conditions or symptoms that resulted in the initial order have not ameliorated to such an extent that the child's needs can be met in a less restrictive setting and that the child's mental condition could be improved by the course of treatment or would deteriorate if untreated.
(c) The department shall transfer a child from a secure residential psychiatric treatment center to another appropriate placement if the mental health professional responsible for the child's treatment determines that the child would no longer benefit from the course of treatment or that the child's treatment needs could be met in a less restrictive setting. The department shall notify the child, the child's parents or guardian, and the child's *guardian ad litem* of a determination and transfer made under this subsection.
(d) In this section, "likely to cause serious harm" has the meaning given in AS 47.30.915.

AS 47.10.990 , Definitions
In this chapter, unless the context otherwise requires,
***
(13) "gravely disabled" has the meaning given in AS 47.30.915;
***
(21) "mental health professional" has the meaning given in AS 47.30.915, except that, if the child is placed in another state by the department, "mental health professional" also

includes a professional listed in the definition of "mental health professional" in AS 47.30.915 who is not licensed to practice by a board of this state but is licensed by a corresponding licensing authority to practice in the state in which the child is placed;
(22) "mental illness" has the meaning given in AS 47.30.915;
***
(31)"secure residential psychiatric treatment center" has the meaning given "residential psychiatric treatment center" in AS 47.32.900 ;

AS 47.30.690, Admission of minors under 18 years of age
(a) A minor under the age of 18 may be admitted for 30 days of evaluation, diagnosis, and treatment at a designated treatment facility if the minor's parent or guardian signs the admission papers and if, in the opinion of the professional person in charge,
(1) the minor is gravely disabled or is suffering from mental illness and as a result is likely to cause serious harm to the minor or others;
(2) there is no less restrictive alternative available for the minor's treatment; and
(3) there is reason to believe that the minor's mental condition could be improved by the course of treatment or would deteriorate further if untreated.
(b) A *guardian ad litem* for a minor admitted under this section shall be appointed under AS 25.24.310 to monitor the best interests of the minor as soon as possible after the minor's admission. If the *guardian ad litem* finds that placement is not appropriate, the *guardian ad litem* may request that an attorney be appointed under AS 25.24.310 to represent the minor. The attorney may request a hearing on behalf of the minor during the 30-day admittance.
(c) The minor may be released by the treatment facility at any time if the professional person in charge or the minor's designated mental health professional determines the minor would no longer benefit from continued treatment and the minor is not dangerous. The minor's parents or guardian must be notified by the facility of the contemplated release.

AS 47.30.700 (2020) Initial involuntary commitment procedures (until Oct. 13, 2022)
(a) Upon petition of any adult, a judge shall immediately conduct a screening investigation or direct a local mental health professional employed by the department or by a local mental health program that receives money from the department under AS 47.30.520 — 47.30.620 or another mental health professional designated by the judge, to conduct a screening investigation of the person alleged to be mentally ill and, as a result of that condition, alleged to be gravely disabled or to present a likelihood of serious harm to self or others. Within 48 hours after the completion of the screening investigation, a judge may issue an *ex parte* order orally or in writing, stating that there is probable cause to believe the respondent is mentally ill and that condition causes the respondent to be gravely disabled or to present a likelihood of serious harm to self or others. The court shall provide findings on which the conclusion is based, appoint an attorney to represent the respondent, and may direct that a peace officer take the respondent into custody and deliver the respondent to the nearest appropriate facility for emergency examination or treatment. The *ex parte* order shall be provided to the respondent and made a part of the respondent's

clinical record. The court shall confirm an oral order in writing within 24 hours after it is issued.
(b) The petition required in (a) of this section must allege that the respondent is reasonably believed to present a likelihood of serious harm to self or others or is gravely disabled as a result of mental illness and must specify the factual information on which that belief is based including the names and addresses of all persons known to the petitioner who have knowledge of those facts through personal observation.

AS 47.30.705 (2020), Emergency detention for evaluation (until Oct. 13, 2022)
(a) A peace officer, a psychiatrist or physician who is licensed to practice in this state or employed by the federal government, or a clinical psychologist licensed by the state Board of Psychologist and Psychological Associate Examiners who has probable cause to believe that a person is gravely disabled or is suffering from mental illness and is likely to cause serious harm to self or others of such immediate nature that considerations of safety do not allow initiation of involuntary commitment procedures set out in AS 47.30.700, may cause the person to be taken into custody and delivered to the nearest crisis stabilization center as defined in AS 47.32.900 or the nearest evaluation facility. A person taken into custody for emergency evaluation may not be placed in a jail or other correctional facility except for protective custody purposes and only while awaiting transportation to a crisis stabilization center or treatment facility. However, emergency protective custody under this section may not include placement of a minor in a jail or secure facility. The peace officer or mental health professional shall complete an application for examination of the person in custody and be interviewed by a mental health professional at the crisis stabilization center, evaluation facility, or treatment facility.
(b) In this section, "minor" means an individual who is under 18 years of age.

AS 47.30.710 (2020), Examination; hospitalization (until Oct. 13. 2022)
(a) A respondent who is delivered under AS 47.30.700 — 47.30.705 to an evaluation facility, except for delivery to a crisis stabilization center as defined in AS 47.32.900, for emergency examination and treatment shall be examined and evaluated as to mental and physical condition by a mental health professional and by a physician within 24 hours after arrival at the facility. A respondent who is delivered under AS 47.30.705 to a crisis stabilization center shall be examined by a mental health professional as defined in AS 47.30.915 within three hours after arriving at the center.
(b) If the mental health professional who performs the emergency examination has reason to believe that the respondent is (1) mentally ill and that condition causes the respondent to be gravely disabled or to present a likelihood of serious harm to self or others, and (2) is in need of care or treatment, the mental health professional may hospitalize the respondent, or arrange for hospitalization, on an emergency basis. If a judicial order has not been obtained under AS 47.30.700, the mental health professional shall apply for an *ex parte* order authorizing hospitalization for evaluation.

AS 47.30.715 (2020), Procedure after order (until Oct. 13, 2022)

When a facility receives a proper order for evaluation, it shall accept the order and the respondent for an evaluation period not to exceed 72 hours. The facility shall promptly notify the court of the date and time of the respondent's arrival. The court shall set a date, time, and place for a 30-day commitment hearing, to be held if needed within 72 hours after the respondent's arrival, and the court shall notify the facility, the respondent, the respondent's attorney, and the prosecuting attorney of the hearing arrangements. Evaluation personnel, when used, shall similarly notify the court of the date and time when they first met with the respondent.

AS 47.30.730, Petition for 30-day commitment
(a) In the course of the 72-hour evaluation period, a petition for commitment to a treatment facility may be filed in court. The petition must be signed by two mental health professionals who have examined the respondent, one of whom is a physician. The petition must
(1) allege that the respondent is mentally ill and as a result is likely to cause harm to self or others or is gravely disabled;
(2) allege that the evaluation staff has considered but has not found that there are any less restrictive alternatives available that would adequately protect the respondent or others; or, if a less restrictive involuntary form of treatment is sought, specify the treatment and the basis for supporting it;
(3) allege with respect to a gravely disabled respondent that there is reason to believe that the respondent's mental condition could be improved by the course of treatment sought;
(4) allege that a specified treatment facility or less restrictive alternative that is appropriate to the respondent's condition has agreed to accept the respondent;
(5) allege that the respondent has been advised of the need for, but has not accepted, voluntary treatment, and request that the court commit the respondent to the specified treatment facility or less restrictive alternative for a period not to exceed 30 days;
(6) list the prospective witnesses who will testify in support of commitment or involuntary treatment; and
(7) list the facts and specific behavior of the respondent supporting the allegation in (1) of this subsection.
(b) A copy of the petition shall be served on the respondent, the respondent's attorney, and the respondent's guardian, if any, before the 30-day commitment hearing.

AS 47.30.735, 30-day commitment, hearing
(a) Upon receipt of a proper petition for commitment, the court shall hold a hearing at the date and time previously specified according to procedures set out in AS 47.30.715.
(b) The hearing shall be conducted in a physical setting least likely to have a harmful effect on the mental or physical health of the respondent, within practical limits. At the hearing, in addition to other rights specified in AS 47.30.660 — 47.30.915, the respondent has the right

(1) to be present at the hearing; this right may be waived only with the respondent's informed consent; if the respondent is incapable of giving informed consent, the respondent may be excluded from the hearing only if the court, after hearing, finds that the incapacity exists and that there is a substantial likelihood that the respondent's presence at the hearing would be severely injurious to the respondent's mental or physical health;
(2) to view and copy all petitions and reports in the court file of the respondent's case;
(3) to have the hearing open or closed to the public as the respondent elects;
(4) to have the rules of evidence and civil procedure applied so as to provide for the informal but efficient presentation of evidence;
(5) to have an interpreter if the respondent does not understand English;
(6) to present evidence on the respondent's behalf;
(7) to cross-examine witnesses who testify against the respondent;
(8) to remain silent;
(9) to call experts and other witnesses to testify on the respondent's behalf.

(c) At the conclusion of the hearing the court may commit the respondent to a treatment facility for not more than 30 days if it finds, by clear and convincing evidence, that the respondent is mentally ill and as a result is likely to cause harm to the respondent or others or is gravely disabled.

(d) If the court finds that there is a viable less restrictive alternative available and that the respondent has been advised of and refused voluntary treatment through the alternative, the court may order the less restrictive alternative treatment for not more than 30 days if the program accepts the respondent.

(e) The court shall specifically state to the respondent, and give the respondent written notice, that if commitment or other involuntary treatment beyond the 30 days is to be sought, the respondent has the right to a full hearing or jury trial.

AS 47.30.740, Procedure for 90-day commitment following 30-day commitment

(a) At any time during the respondent's 30-day commitment, the professional person in charge, or that person's professional designee, may file with the court a petition for a 90-day commitment of that respondent. The petition must include all material required under AS 47.30.730(a) except that references to "30 days" shall be read as "90 days"; and

(1) allege that the respondent has attempted to inflict or has inflicted serious bodily harm upon the respondent or another since the respondent's acceptance for evaluation, or that the respondent was committed initially as a result of conduct in which the respondent attempted or inflicted serious bodily harm upon the respondent or another, or that the respondent continues to be gravely disabled, or that the respondent demonstrates a current intent to carry out plans of serious harm to the respondent or another;
(2) allege that the respondent has received appropriate and adequate care and treatment during the respondent's 30-day commitment;
(3) be verified by the professional person in charge, or that person's professional designee, during the 30-day commitment.

(b) The court shall have copies of the petition for 90-day commitment served upon the respondent, the respondent's attorney, and the respondent's guardian, if any. The petition for 90-day commitment and proofs of service shall be filed with the clerk of the court, and a date for hearing shall be set, by the end of the next judicial day, for not later than five judicial days from the date of filing of the petition. The clerk shall notify the respondent, the respondent's attorney, and the petitioner of the hearing date at least three judicial days in advance of the hearing.
(c) Findings of fact relating to the respondent's behavior made at a 30-day commitment hearing under AS 47.30.735 shall be admitted as evidence and may not be rebutted except that newly discovered evidence may be used for the purpose of rebutting the findings.

AS 47.30.775, Commitment of minors
The provisions of AS 47.30.700 - 47.30.815 apply to minors. However, all notices required to be served on the respondent in AS 47.30.700 - 47.30.815 shall also be served on the parent or guardian of a respondent who is a minor, and parents or guardians of a minor respondent shall be notified that they may appear as parties in any commitment proceeding concerning the minor and that as parties they are entitled to retain their own attorney or have the office of public advocacy appointed for them by the court. A minor respondent has the same rights to waiver and informed consent as an adult respondent under AS 47.30.660 - 47.30.915; however, the minor shall be represented by counsel in waiver and consent proceedings.

AS 47.30.915 (2020), Definitions (until Oct. 13, 2022)
In AS 47.30.660 — 47.30.915,
***
(5) "designated treatment facility" or "treatment facility" means a hospital, clinic, institution, center, or other health care facility that has been designated by the department for the treatment or rehabilitation of mentally ill persons under AS 47.30.670 — 47.30.915 but does not include correctional institutions;
***
(7) "evaluation facility" means a health care facility that has been designated or is operated by the department to perform the evaluations described in AS 47.30.660 — 47.30.915, or a medical facility licensed under AS 47.32 or operated by the federal government

AS 47.32.010 (2020), Purpose and Applicability (until Oct. 13. 2022)
(a) The purpose of this chapter is to establish centralized licensing and related administrative procedures for the delivery of services in this state by the entities listed in (b) of this section. These procedures are intended to promote safe and appropriate services by setting standards for licensure that will reduce predictable risk; improve quality of care; foster individual and patient rights; and otherwise advance public health, safety, and welfare.
(b) This chapter and regulations adopted under this chapter apply to the following entities:
(1) ambulatory surgical centers;

(2) assisted living homes;
(3) child care facilities;
(4) child placement agencies;
(5) foster homes;
(6) freestanding birth centers;
(7) home health agencies;
(8) hospices, or agencies providing hospice services or operating hospice programs;
(9) hospitals;
(10) intermediate care facilities for individuals with an intellectual disability or related condition;
(11) maternity homes;
(12) nursing facilities;
(13) residential child care facilities;
(14) residential psychiatric treatment centers;
(15) runaway shelters;
(16) rural health clinics;
(17) crisis stabilization centers.

(c) The provisions of AS 47.05.300 — 47.05.390, regarding criminal history, criminal history checks, criminal history use standards, and civil history databases, apply to entities listed in (b) of this section, as provided in AS 47.05.300.

AS 47.32.990 (2020), Definitions (until Oct. 13. 2022)
In this chapter,
***
(14) "hospital" means a public or private institution or establishment devoted primarily to providing diagnosis, treatment, or care over a continuous period of 24 hours each day for two or more unrelated individuals suffering from illness, physical or mental disease, injury or deformity, or any other condition for which medical or surgical services would be appropriate; "hospital" does not include a frontier extended stay clinic;
***
(20) "residential psychiatric treatment center" means a secure or semi-secure facility, or an inpatient program in another facility, that provides, under the direction of a physician, psychiatric diagnostic, evaluation, and treatment services on a 24-hour-a-day basis to children with severe emotional or behavioral disorders;

Alaska Court Rules
CINA Rule 1, Title – Scope – Construction – Situations Not Covered by the Rules
***
(c) Construction. — These rules will be construed and applied to promote fairness, accurate fact-finding, the expeditious determination of children's matters, and the best interests of the child.
***

(g) Situations Not Covered by These Rules. — Where no specific procedure is prescribed by these rules, the court may proceed in any lawful manner, including application of the Civil Rules, applicable statutes, the Alaska and United States Constitutions or the common law. Such a procedure may not be inconsistent with these rules and may not unduly delay or otherwise interfere with the unique character and purpose of child in need of aid proceedings.

Probate Rule 1,
Rule 1, *Title – Scope – Construction – Situations Not Covered by the Rules*
***
(c) Construction. — These rules will be construed and applied to promote fairness, accurate fact-finding, and prompt decisions.
***
(e) Situations Not Covered by the Rules. — Where no specific procedure is prescribed by these rules, the court may proceed in any lawful manner, including application of the Civil and Evidence Rules, applicable statutes, the Alaska and United States Constitutions or common law. Such a procedure may not be inconsistent with these rules and may not unduly delay or otherwise interfere with the unique character and purpose of probate proceedings.

Alaska Administrative Code
7 AAC 12.215, Psychiatric hospitals.
(a) A hospital which is primarily engaged in providing to inpatients psychiatric services for the diagnosis and treatment of mental illness is a psychiatric hospital and must comply with the provisions of this section.
***
(d) A psychiatric hospital must have policies and procedures which require that it
(1) have a transfer agreement with a general acute care hospital which includes provision for transfer of a patient's records upon transfer of the patient;
(2) admit and discharge patients in accordance with AS 47.30;

7 AAC 50.825, Admission
***
d) To admit a child for treatment as a resident, a residential psychiatric treatment center must document that

(1) other care or treatment resources available in the community or region do not meet the treatment needs of the child because the other care or treatment resources are

(A) more restrictive or less restrictive than necessary to appropriately treat the child; or

(B) provided in a setting less restrictive than the facility, but the child's treatment history shows that when therapeutic services in less restrictive settings have been provided to the child the services have been ineffective;

(2) proper treatment of the child's psychiatric condition requires treatment and services on an inpatient residential basis under the direction of a physician because the child

(A) has a psychiatric condition or disorder that meets the diagnostic criteria as set out in the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders,* Fifth Edition *(DSM-5)*, adopted by reference as amended from time to time;

(B) requires the intensity of services available at a residential psychiatric treatment center, as documented by the clinical director of the facility, specifically including the following needs:

(i) a need for treatment services to be supervised by a psychiatrist;

(ii) a need for mental health professionals to be available to intervene with the child 24 hours a day;

(iii) a need for the child to concurrently receive multiple therapies;

(C) does not demonstrate mental, emotional, or behavioral dysfunction that requires acute psychiatric hospitalization, such as a serious gesture or an actual attempt at suicide; and

(D) does not demonstrate actual behavior of assaults or escalation towards assault that cannot be managed at the level of care available in the facility; and

(3) the services provided by the facility can reasonably be expected to improve the child's condition or to prevent further regression so that services of a residential psychiatric treatment center will no longer be needed.

STATEMENT OF JURISDICTION

The trial court made an oral order on January 18, 2022, finding that the minor's hospitalization was authorized under AS 47.10.087(a), and declining to apply AS 47.30.700 *et seq.*; a written order authorizing the youth's placement under AS 47.10.087(a) was subsequently issued on June 23, 2022. This Court has jurisdiction to hear this matter pursuant to AS 47.10.080(i), AS 47.30.765, and Alaska Rule of Appellate Procedure 218.

PARTIES

The Appellant is the Native Village of Kwinhagak, which has intervened in this Child in Need of Aid ("CINA") proceeding pursuant to 25 U.S.C. § 1911. Appellees are the minor, Mira; the mother, Elaine; the youth's *guardian ad litem*, Monica Charles; and the State of Alaska, Department of Family and Community Services, Office of Children's Services ("OCS").

STATEMENT OF ISSUES

1. Whether the trial court erred in applying AS 47.10.087, which governs pre-admission review of placement in secure residential psychiatric treatment centers, instead of applying AS 47.30.700-815, which govern evaluations facilities and licensed psychiatric hospitals, to evaluate a minor's placement at a psychiatric hospital subsequent to admission at a hospital, when she had been hospitalized continuously, without consent, for 46 days at the time of the first evidentiary hearing to evaluate the necessity of her hospitalization.

2. Whether it is a violation of a foster youth's right to equal protection under Alaska's Constitution to provide foster youth with less due process than would be provided to any youth not in OCS custody.
3. Whether, in a CINA case in which neither the minor nor any parent consented to the minor's admission to any hospital or other facility for psychiatric treatment, regardless of the facility's status (or lack thereof) as a "designated," facility, the minor's liberty interests and rights to due process under Alaska's Constitution were violated when the first judicial review of her involuntary hospitalization occurred 46 days after her admission.

STATEMENT OF THE CASE

This appeal concerns the continuous, involuntary hospitalization of a foster youth, Mira J., for 46 days – first at Sitka Community Hospital for 18 days, then at North Star Hospital for 28 days – before any evidence was taken on the necessity of her hospitalization.

Mira J. was removed from the care of her mother, on an emergency basis, on August 23, 2019, amid allegations of, *inter alia*, substance abuse and neglect. [Exc. 1]. Mira was adjudicated a Child in Need of Aid and placed in the custody of OCS on December 12, 2019. [Exc. 17]

In the intervening years, as Mira has struggled with mental health issues, OCS has attempted to override her parent's right to withhold consent to psychotropic medication. [R. 263-65]. Long before Mira was hospitalized during this period of custody, OCS had

contemplated that she may require involuntary inpatient psychiatric care; when the prospect of residential treatment was suggested, Mira "got very angry." [R. 265].

In a *Delayed Notice of Change in Placement* dated December 13, 2021, OCS indicated that Mira had been placed at Sitka Community Hospital on December 3, 2021, "due to drinking alcohol." [Exc. 25]. In response to an inquiry by the Tribe regarding Mira's whereabouts and wellbeing, OCS informed the legal parties by email that she had been transferred the day prior from Sitka Community Hospital to North Star Hospital. [Exc. 28]. OCS explained that the transfer from Sitka Community Hospital to North Star Hospital was a "bed to bed transfer"; Mira had been continuously hospitalized since December 3, 2021. [Exc. 26].

Asked to explain the reason for the transfer, OCS indicated that following Mira's initial presentation at Sitka Community Hospital, she was "observed for several hours and medically cleared," and that the "on-call Clinician [sic] recommended discharge to the foster home." [Exc. 30]. OCS further reported that the clinician had advised Mira did not require "24/7 supervision[;] just ongoing counseling and support." [Exc. 30]. However, her foster home refused to allow her to return, and OCS was without an immediately available placement. [Exc. 30]. At some point between December 3 and December 21, 2021, OCS decided to transfer Mira to North Star Hospital. [Exc. 30].

Per caseworker Amanda Meppen, the transfer to North Star Hospital had been planned since at least December 14, 2021, when Ms. Meppen had returned from personal leave. [Exc. 77]. The reasons for this transfer from Sitka Community Hospital to North Star Hospital are given variously as "severe anxiety and major depressive disorder"

manifesting through "ataxia" and a "panic attack," and unspecified "concerns for suicidal ideation and self-harming behaviors." [Exc. 30]. By the time her hospitalization was finally evaluated on January 18, 2022, those reasons had evolved to include allegations that Mira had attempted suicide by taking alcohol and gabapentin, which Mira disputed. [Exc. 52, 65-66, 78].

There is no indication that Mira's mother was consulted regarding her hospitalizations after Mira was medically cleared for discharge within hours of her presentation at Sitka Community Hospital, or that she consented to Mira's hospitalization. [Exc. 77]. OCS makes no indication that Mira, in fact, consented to her continued hospitalization, only that Mira had "voiced to the medical staff at Sitka that she felt she didn't get what she needed from her last inpatient stay," at some point [Exc. 26]. By December 22, 2021, Mira had voiced to the Tribe that she did not wish to be at North Star Hospital. [Exc. 22, 32]. By the time her placement was reviewed on January 18, 2022, her OCS worker testified that, "[Mira] is very angry each time I've spoken with her and she has very clearly stated that she is not happy being there, that she does not want to be at North Star." [Exc. 78].

Leading up to Mira's bed-to-bed transfer from Sitka Community Hospital to North Star Hospital, no individual or entity sought judicial review of Mira's inpatient admission for psychiatric treatment. [Exc. 76]. Asked whether, at the time of admission, North Star Hospital was aware of any order authorizing Mira's hospitalization, North Star asserted that "North Star is a voluntary placement." [Exc. 60]. The first and only motion seeking such review was filed by the Tribe, which sought expedited consideration of its motion for

the trial court to evaluate the necessity of Mira's hospitalization using the framework of AS 47.30.700 *et seq*. in a filing submitted after hours on December 22, 2021. [Exc. 18-32]. In its motion, the Tribe flagged the need for review based on the statute, but also to protect the important constitutional rights at stake when an individual is involuntarily hospitalized. [Exc. 23].

In response to the Tribe's motion, an order appointing counsel for Mira was issued December 27, 2021, [Exc. 33], and a hearing was set for December 30, 2021 by order dated December 28, 2021. [Exc. 34]. Counsel for the Tribe was absent, having been omitted from the service of the order. [Exc. 34]. At the hearing over which Judge Montgomery presided, OCS indicated that the proper standard of review would be under AS 47.10.087, pursuant to a statewide preliminary injunction issued by Judge Marston in *Hooper Bay et al. v. Lawton et al.*, 3AN-14-05238 CI, requiring post-admission review of a foster youth's admission to North Star Hospital within 30 days of admission. [Tr. 4, Dec. 30, 2021]. OCS reasoned that because Mira had only been admitted to North Star Hospital on December 21, 2021, a review was only required within 30 days of that date; OCS requested to come back within the next two and a half weeks. [Tr. 4, Dec. 30, 2021]. The December 30, 2021 hearing was continued owing to several issues: OCS had not made arrangements for the testimony of a mental health professional; the Public Defender Agency had been appointed to represent the minor, although it already represented the mother; and the GAL had not yet had any contact with Mira, because OCS had not yet provided the GAL with the confidentiality code used by North Star Hospital to screen calls to patients. [Tr. 4, 6, 8, Dec. 30. 2021].

Although the trial court attempted to begin taking evidence on the necessity of Mira's hospitalization again before Judge Montgomery on January 7, 2022, it was unable to proceed because no counsel had yet entered an appearance on behalf Mira, and the Public Defender appearing on behalf of her mother was unable to fairly represent two clients. [Tr. 8-10, 12, Jan. 7, 2022]. In addition, the Tribe raised concerns about whether or not the proposed witness, whose personal interactions with Mira consisted of facilitating one group session, and who did not make any of her diagnoses, had sufficient personal knowledge of Mira to properly offer testimony on the necessity of her hospitalization. [Tr. 7-8, 10-11, Jan. 7, 2022]. OCS again asserted that under the *Hooper Bay* preliminary injunction, the time frame for any necessary review would be within 30 days of Mira's admission to North Star Hospital on December 21, 2021, not her earlier admission to Sitka Community Hospital on December 3, 2021. [Tr. 12, Jan. 7, 2022]. The Tribe, again, argued that review should be prompt, as Mira had already been hospitalized for weeks prior to her admission to North Star Hospital; noting that AS 47.30.775 and AS 47.30.760 both contemplate that involuntary hospitalizations could continue to apply as individuals are moved to less restrictive environments, or different facilities, and that Mira had been hospitalized for over a month with no known judicial review. [Tr. 13-14, Jan. 7. 2022]. [1]

One day before planned review set for January 14, 2022, OCS filed an affidavit by Gennifer Moreau-Johnson, director of the Division of Behavioral Health, Department of

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[1] The transcript incorrectly transcribes the statutes as, for example, AS 47.37.075, rather than AS 47.30.775; all transcriptions of AS 47.37.0XX should be read as AS 47.30.7XX.

Health and Social Services, indicating that "[t]he child/adolescent psychiatric hospital North Star Hospital is not 'designated' in any way," as a facility for treatment, evaluation, or stabilization under AS 47.30.670-47.30.915. [Exc. 36]. The Tribe responded on January 14, 2022 with a filing indicating that both North Star Hospital and Sitka Community Hospital, as medical facilities licensed under AS 47.32, fall within AS 47.30.915's definition of "evaluation facility." [Exc. 37]. The Tribe also pointed out that the promise of AS 47.30.760 – that treatment "shall always be available at a state-operated hospital" – is simply not true as to youth. [Exc. 38]. Instead, the Tribe pointed out that North Star Hospital, through its website, claimed to be the "'only program in the entire state of Alaska providing [acute inpatient treatment] to children under the age of 13.'" [Exc. 38, 40]. And, again, the Tribe pointed out that – "designated" or not – North Star Hospital, as a psychiatric hospital, was required by 7 AAC 12.215 to admit and discharge patients in accordance with AS 47.30. [Exc. 38].

When the trial court resumed proceedings regarding Mira before Judge Montgomery on January 14, 2022, no mental health professional was present or available to offer testimony on Mira's current condition or the necessity of her continued hospitalization. [Tr. 6, Jan. 14, 2022]. The trial court noted OCS's position, that a hearing to put on testimony regarding the necessity of Mira's hospitalization at North Star Hospital would not be required until the next Friday, January 21, 2022. [Tr. 6, Jan. 14, 2022]. The Tribe, again, noted that Mira's continued involuntary hospitalization without review was a violation of her rights, because Mira had been continuously hospitalized since December 3, 2021, and because North Star Hospital, as a licensed psychiatric hospital, is required by

regulation to admit and discharge patients pursuant to AS 47.30 *et seq.* [Tr. 11, Jan. 14, 2022].

An evidentiary hearing on Mira's involuntary hospitalization, with the benefit of appointed counsel representing Mira, finally occurred on January 18, 2022, 46 days after her initial hospitalization. At that hearing before Judge Montgomery, the Department presented the testimony of Dannon Mims who, as a licensed professional counselor within Alaska since 2014, was recognized as a mental health professional within the definition of AS 47.30.715. [Exc. 50-51]. Ms. Mims, whose therapeutic relationship with Mira at that point amounted to one offered and refused individual counseling session, and one "family session" with Ms. Meppen, [Exc. 58], testified in generalities regarding Mira's current status and diagnoses. [Exc. 50-75].

Ms. Mims testified that Mira's psychiatrist had diagnosed Mira with a mental illness, then went on to list a host of diagnoses: "alcohol use disorder, unspecified; dysthymic disorder, early onset; PTSD, chronic and acute; generalized anxiety disorder; overanxious disorder of early childhood issues; oppositional defiant disorder . . . . [and] ADHD, combined type, as well as a cognitive disorder." [Exc. 52]. Ms. Mims further testified that she believed that Mira would be likely to cause serious harm to herself or someone else. [Exc. 52]. This belief was based on incidents where Mira had "postured" toward her peers – by approaching them with closed fists, and making verbal threats. [Exc. 53-54]. On cross examination, Ms. Mims testified that, to her knowledge, Mira had never actually engaged in violence toward her peers. [Exc. 65]. In support of Ms. Mims' conclusion that Mira was a risk to herself, Ms. Mims recounted incidents where Mira has

stated that she does not want to live, and that no one understands. [Exc. 54-55]. Yet, Ms. Mims could not recall the last time such a statement was made or any incident where Mira had self-harmed since her admission to North Star Hospital. [Exc. 54, 65]. Prompted to explain an incident wherein Mira had reportedly consumed hand sanitizer, despite being on the highest level of supervision available within North Star Hospital, and despite previously denying that there were any incident reports issued as pertaining to Mira, Ms. Mims explained that Mira had been sent to the ER after consuming hand sanitizer while under North Star Hospital's care. [Exc. 55-56, 62-63, 66-68].

In response to OCS's inquiry regarding whether less restrictive alternatives were available to Mira, Ms. Mims indicated that applications to less restrictive facilities had only been submitted the week prior, prompted by Ms. Meppen's request. [Exc. 56-57]. One application, to ARCH, had not yet been submitted, because that application required a release to be signed by Mira. [Exc. 74]. Ms. Mims testified that ARCH would be an appropriate place for Mira to discharge to from North Star. [Exc. 75]. But, because Mira had refused her weekly individual therapy in the prior week, no one from North Star had discussed ARCH as an option for discharge with Mira. [Exc. 58, 74-75]. Indeed, asked whether North Star had worked with Mira to ascertain what type of facility she might be interested in discharging to, or what type of treatment she *would* consent to, Ms. Mims indicated no knowledge of anyone having engaged Mira in those conversations at all [Exc. 69, 74-75].

In argument concluding the hearing, OCS argued that Mira's admission was authorized under AS 47.10.087 (a). [Exc. 79-82]. The *guardian ad litem* advised the trial

court that "it would be good to keep [Mira] under a more watchful eye until a more appropriate placement can be found." [Exc. 82]. Mira's mother, through counsel, argued that continued hospitalization was not required because a less restrictive alternative had not been tried and failed, and because OCS had not met its burden to prove that there was no less restrictive alternative. [Exc. 82-85]. Through counsel, Mira argued, in addition, that OCS had not met its burden to prove that she was likely to cause serious harm to herself or others, under 47.30.915, drawing a distinction between the dramatic statements of a teenager, and a suicidal plan or attempt. [Exc. 85-89]. Mira also suggested that placement at North Star Hospital was inappropriate due to a lack of evidence that she was likely to improve while at North Star, noting that no one had addressed Mira's preferences with respect to continued treatment in the duration of her time there, and that she had managed to attain an unsafe blood alcohol level there due to consumption of hand sanitizer under inadequate supervision. [Exc. 88-89]. The Tribe joined in the substance of these arguments, but noted that the appropriate statutory framework remained the civil commitment statutes, which were not met. [Exc. 90-92].

The trial court found that Mira suffered from a mental illness, and that she was likely to cause serious harm to herself based on her consumption of substances – whether or not the consumption was intended to induce harm. [Exc. 93-96]. The court expressed skepticism that Ms. Mims' testimony that Mira's blood alcohol registered at 2.0 was accurate – she would be dead – and registered concern as to how a minor might consume so much hand sanitizer that their blood alcohol level would register at even 0.20. [Exc. 96]. The court went on to find that there was no reasonably available less restrictive alternative,

while registering that this may have been due to "lack of planning and foresight" in that applications to such facilities had only been sent out one week prior. [Exc. 96-97]. Finally, the court found that Mira's condition was likely to deteriorate if left untreated, noting that "North Star is not the place for that treatment." [Exc. 98].

While making the findings under AS 47.10.087(a) the court reasoned:

> I'm not sure why there's a different procedure for .087 versus 47.30, although both seem to suggest, as you read the opening sentence of 47.10.087, the court may authorize the Department to place a child, which would seem to suggest that authorization would need to be made before the child was placed there, not within 30 days of the child being placed there. No different than what would be an emergency petition that the Court sees one or two a day on [sic] that involve a 47.30, and these are the exact same definitions that would apply in a 47.30 versus a 47.10.087. [Exc. 97-98].

Asked to clarify whether, by issuing an order under AS 47.10.087, the court was finding that the civil commitment statutes do not apply, the court ruled that the civil commitment statutes did not apply, although the court also noted that a scheme giving foster youth fewer rights than other children was mystifying. The court explained:

> I don't know why somebody in OCS custody would be entitled to less rights, but that's clearly what 47.10.087 does. And so . . . 47.10.087 does not entitle the minor to the hearing within 72 hours and the like, at least not expressly. . . I think the statute and the procedure should be followed closer to 47.30, which isn't a great burden on anybody to file a five-page petition, as I said before, that this Court frequently gets for mental [commitments], that you see the exact same statute once somebody is attempting to admit somebody against their will. So while it's not specifically and expressly addressed in 47.10.087, the Court is finding that because it's not expressly given and we are in a CINA case, that those rights do not apply. [Exc. 102-103].

Following the hearing, OCS submitted its proposed *Findings and Order Authorizing Placement in Secure Residential Psychiatric Treatment Center*, a form document, which

the Judge Haas entered over the objections of the Tribe, which filed its own proposed order making more specific factual findings. [Exc. 41-49; R. 39-60].[2]

Though Mira had discharged previously from North Star Hospital, by June 17, 2022, she had been readmitted. [R. 10]. Nearly three weeks later, through an expedited filing dated July 5, 2022, the Department sought retroactive review of her placement under AS 47.10.087, to take place within 30 days of her admission, no later than July 15, 2022. [R. 9-10].

STANDARDS OF REVIEW

In interpreting the Alaska Constitution and statutes, the Court applies its "independent judgment" and adopts the "'rule of law that is most persuasive in light of precedent, reason, and policy."[3] Whether factual findings comport with statutory requirements are questions of law requiring *de novo* review.[4]

ARGUMENT

Mira, solely by virtue of being in foster care, is deprived of protections against unwarranted involuntary hospitalization that youth who are not in OCS custody enjoy. As confirmed by *In re Necessity for the Hospitalization of April S.*, the protections provided

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2 The Tribe, through counsel, retains no record of receiving the proposed order used by the Court in Exc. 41-44, which indicates service on parties on January 20, 2022; the Tribe did receive the proposed order filed January 25, 2022, Exc. 45-49, which was not used by the trial court. It was the proposed order filed January 25, 2022 to which the Tribe responded in R. 39-60.

3 *Wetherhorn v. Alaska Psychiatric Inst.*, 156 P.3d 371, 375 (Alaska 2007) (citing *Guin v. Ha*, 591 P.2d 1281, 1284 n.6 (Alaska 1979)).

4 *Id.* at 375. *See also Trevor M. v. State, Dep't of Health & Soc. Servs., Office of Children's Servs.*. 368 P.3d 607, 610 (Alaska 2016).

by civil commitment statutes *do apply* to youth in OCS custody.[5] This is no less true when, as in the circumstances in this case, as foster youth has been involuntarily hospitalized at facilities that have not been "designated" as evaluation or treatment facilities. Alaska's statutes and Constitution provide necessary protection for these youth.[6] OCS's arguments to the contrary are absurd: if this Court was to find that Alaska's civil commitment statutes do not apply, then a dangerous loophole would exist, wherein a child's liberty interests can be disregarded, based solely on where OCS has chosen for that child to be hospitalized – and the child's status as a foster youth. Such an outcome – affecting such vulnerable youth – demands a robust and prescriptive interpretation of Alaska's constitutional protections of liberty and due process.[7]

I. The Trial Court Erred by Applying AS 47.10.087 to the Youth's Involuntary Hospitalization, Rather than AS 47.30.700 *et seq.*

Although Mira was medically cleared for discharge the same day she presented to Sitka Community Hospital for alcohol consumption (December 3, 2021), Mira was not discharged. In fact, no steps were taken to protect Mira's liberty interests to not be confined against her will until the Tribe submitted its request for a hearing under AS 47.30.700 *et seq.* immediately upon learning she remained hospitalized, 19 days later. The trial court

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5 *In re Necessity for the Hospitalization of April S.*, 499 P.3d 1011, 1019 (Alaska 2021).

6 Alaska Const. Art. I §§ 1, 7, 22 (enshrining rights to liberty, due process, and privacy).

7 *See Alaska Fish & Wildlife Conservation Fund v. State*, 347 P.3d 97, 102 (Alaska 2015) ("If a case may be fairly decided on statutory grounds or on an alternative basis, we will not address the constitutional issues.") (internal quotations and citations omitted).

rejected the Tribe's argument and determined that the statutory constructs of AS 47.10.087 applied instead. Although some of the standards are the same, with AS 47.10.087 borrowing many definitions from the civil commitment statutes,[8] the protections are not equivalent. The trial court's misapplication and interpretation of the law deprived Mira of statutory and due process protections to which any child *not* in OCS custody would be entitled.

The trial court refused to apply AS 47.30.700 *et seq.* because it deemed itself constrained to apply only CINA laws in CINA cases. But the State argued something different – that the civil commitment statutes, and their protections, would not apply because of the type of facilities OCS chose for Mira's treatment, based the preliminary injunction entered in the *Hooper Bay* litigation. But both are in error. The court was free to apply statutes outside of AS 47.10. And both Sitka Community Hospital, as an "evaluation facility," and North Star Hospital, a psychiatric hospital required by state regulation to admit and discharge patients in accordance with AS 47.30, are facilities subject to AS 47.30.700 *et seq.*

A. Protections Outlined in AS 47.30.700-815 Apply to Admissions to Both Sitka Community Hospital and North Star Hospital.

As this Court recognized in *In the Matter of the Hospitalization of April S.*, the protections of the involuntary civil commitment statutes are available to foster youth in

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[8] *Compare* AS 47.10.087, AS 47.10.990 *with* AS 47.30.915 (2020) (sharing definitions of, *inter alia*, "gravely disabled," "mental health professional," and "likely to cause serious harm").

OCS custody; such proceedings are not "voluntary."[9] But, in this case, OCS has suggested that the protections of AS 47.30 *et seq.* do not apply to Mira's case because neither Sitka Community Hospital nor North Star Hospital has been designated as a "'designated evaluation and stabilization facilit[y]' or 'designated treatment facilit[y]' or 'treatment facilit[y]'" as those terms are used in the statute. [Exc. 35-36]. That does not mean that Mira was without statutory protections during her 46-day hospitalization leading up to her first opportunity for judicial review. Sitka Community Hospital, at the very least, is an "evaluation facility."[10] Further, the robust statutory protections of the civil commitment statutes are mandated, at least at North Star Hospital, because as a psychiatric hospital, it must have policies and procedures with regard to admission and discharge in accordance with AS 47.30.[11]

There is no evidence that any petition was filed with respect to Mira's two, consecutive hospitalizations, nor were any *ex parte* order issued.[12] The only way a respondent can be detained for evaluation, in the absence of such a court order is if, in the case of an emergency, a qualified individual such as a peace officer, psychiatrist, or

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9 *Hospitalization of April S.*, 499 P.3d at 1019-20.

10 *See* AS 47.30.915(7) (2020) ("a medical facility licensed under AS 47.32"); AS 47.32.900(13)(2020) ("hospital")).

11 *See* 7 AAC 12.215(d)(2).

12 Pursuant to AS 47.30.700, an individual may be detained for evaluation on an *ex parte* order. This path requires a judge evaluating a petition by *any adult* to evaluate whether there is "probable cause to believe the respondent is mentally ill and that condition causes the respondent to be gravely disabled or to present a likelihood of serious harm to self or others." *Id.* If there is, the judge may order appointment of counsel to the respondent and issue an *ex parte* order directing a peace officer to "deliver the respondent to the nearest appropriate facility for emergency examination or treatment." *Id.*

licensed physician or clinical psychologist, causes an individual to be transported to the "nearest crisis stabilization center, as that term is defined in AS 47.32.900 or the nearest evaluation facility" for evaluation.[13] Upon arrival, and in no less than 24 hours, the respondent must be evaluated by a "mental health professional."[14] If the mental health professional completing the examination at the "nearest crisis stabilization center" or "nearest evaluation facility," believes that the respondent is "mentally ill and that the condition causes the respondent to be gravely disabled or to present a likelihood of serious harm to self or others," and "is in need of treatment", then they are required to apply for an "*ex parte* order authorizing hospitalization for evaluation."[15]

Both Sitka Community Hospital and North Star Hospital qualify as "evaluation facilities." While the statute has since been amended, "evaluation facility" was defined during the relevant period to include not just facilities that have been "designated," but also a "medical facility licensed under AS 47.32."[16] Among the facilities licensed under AS 47.32 are hospitals.[17] As the State conceded at oral argument in *Mabel B.*, the term

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13 AS 47.30.705(a) (2020).

14 AS 47.30.710 (2020).

15 *Id.*.

16 AS 47.30.915(7) (2020).

17 AS 47.32.010 (2020). It is worth noting that "medical facilit[ies] licensed under AS 47.32" is omitted in statutes which take effect October 13, 2022; instead, "evaluation facility" is defined to mean "a hospital or crisis residential center that has been designated or is operated by the department to perform the evaluations described in AS 47.30.660 – 47.30.915, or a medical facility operated under [the Indian Self-Determination and Education Assistance Act], as amended, that performs evaluations." AS 47.30.915 (2022). This means, as a practical matter, that if OCS chooses to allow a foster child to be hospitalized at Sitka Community Hospital for over two weeks, despite discharge being previously recommended, in November 2022, there will be no statutory roadmap for how to provide due process.

"evaluation facility" is "intended as a broad definition," so signaled by deleting the word "designated" from the statute that used the term "designated treatment facility" prior to 1981.[18] Thus, both Sitka Community Hospital and North Star Hospital were under an obligation to promptly evaluate Mira. Mental health professionals at either facility should have requested an *ex parte* order for hospitalization for evaluation if there was reason to believe Mira was mentally ill and that her condition caused her to be gravely disabled or to present a likelihood of serious harm to herself or others, and that she was in need of treatment.[19] The protections described in AS 47.30.700 – requiring appointment of counsel, and probable cause findings, supported by findings of facts – should have attached on the first day of Mira's lengthy involuntary hospitalization.[20] Without an *ex parte* order authorizing hospitalization, Mira should have been free to go.

Addressing lengthier commitments past the period for emergency detention and evaluation, the statutes reference only the term "treatment facility."[21] "Treatment facility" is defined as "a hospital, clinic, institution, center, or other health care facility that has been designated by the department for the treatment or rehabilitation of mentally ill persons."[22] In contrast to an "evaluation facility," a "treatment facility" is not defined to include "a

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18 Oral Arguments at 30:52, *In re Necessity for the Hospitalization of Mabel B.*, 485 P.3d 1018 (Alaska 2021). *See also* S. Health, Educ., and Soc. Servs. Comm., at 7:50—14:00 (Mar. 6, 1981) (testimony of Verner Stillner, Dir., Div. of Mental Health & Developmental Disabilities, Dep't of Health & Soc. Servs.).

19 AS 47.30.705 (2020).

20 *See* AS 47.30.700 (2020).

21 *See* AS 47.30.730-735.

22 AS 47.30.915(5) (2022).

health care facility . . . operated by the department."[23] Instead, AS 47.30.760 provides treatment "shall always be available at a state-operated hospital." But this is not true for all Alaskans; the Alaska Psychiatric Institute accepts only "adolescents," and the unit itself has only 10 beds.[24] At times, the unit has been entirely closed to patients.[25] For most minors, treatment *is not* "available at a state-operated hospital."

Instead, North Star Hospital, which claims to be the "only program in the entire state of Alaska providing [acute inpatient treatment] to children under the age of 13," fills the need that API is unable to meet. [Exc. 40]. In oral arguments before the Alaska Supreme Court in *Mabel B.*, the Court questioned whether or not it might be possible – through a licensing scheme – that a facility might be required to admit or discharge pursuant to the civil commitment statutes.[26] For minors, who may be admitted to North Star Hospital rather than to API, the answer is yes. Alaska's licensing scheme already requires this. As a "child/adolescent psychiatric hospital," [Exc. 36], North Star Hospital is governed by 7 AAC 12.215. That regulation provides "a hospital which is primarily engaged in providing to inpatients psychiatric services for the diagnosis and treatment of mental illness is a

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23 *Compare id. with* AS 47.30.915(7) (2020)

24 *See* Alaska Dep't of Family & Comm. Servs., Alaska Psychiatric Institute (last visited Oct. 10, 2022), https://dfcs.alaska.gov/api/pages/default.aspx (indicating availability of 10 beds in the adolescent unit, with 10 beds occupied).

25 Alaska Psychiatric Inst., Governing Board Minutes (June 17, 2021), *available at* https://aws.state.ak.us/OnlinePublicNotices/Notices/View.aspx?id=202498 (noting the unit had reopened on May 3, 2021, and was gradually increasing its census).

26 Oral Arguments at 32:00, *Mabel B.*, *supra* n.18 (Justices positing that a solution to the dearth of psychiatric resources – in the adult context – could be conditioning licensure upon acceptance of patients for court-ordered treatment

psychiatric hospital and *must comply* with the provisions of this section."[27] The regulation goes on to state, "[a] psychiatric hospital must have policies and procedures which require that it . . . admit and discharge patients in accordance with AS 47.30."[28] Thus, while not explicitly "designated" as a treatment facility, North Star Hospital is licensed as a psychiatric hospital, in which its designation as a facility to be used for inpatient, acute psychiatric treatment, admitting and discharging patients pursuant to AS 47.30.700 *et seq.* is inherent. For this reason, the rights and protections of AS 47.30, which safeguard the liberty interests of patients, attach to all youth admitted to North Star Hospital, foster youth not least.

B. It Is Appropriate to Apply AS 47.30.700 *et seq.* Framework within the CINA Proceedings.

Despite being troubled by the disparate treatment of foster youth, through the application of AS 47.10.087, rather than the civil commitment statutes, the trial judge indicated the court was constrained to applying AS 47.10.087. [Exc. 73-74]. The judge – in a CINA proceeding, having not been presented with any petition under AS 47.30.700 or AS 47.30.710, for emergency detention and evaluation; under AS 47.30.730, for 30-day commitment; nor under 47.30.740 for a 90-day commitment – felt constrained to apply only CINA statutes to CINA cases. However, the law can and should be interpreted to allow the statutory framework of AS 47.30.700-815 to be applied within a CINA case.

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27 7 AAC 12.215(a) (emphasis added).
28 7 AAC 12.215(d)(2).

The Probate and CINA Rules urge flexibility in two ways. First, the CINA Rules must be "construed and applied to promote fairness, accurate fact-finding, the expeditious determination of children's matters, and the best interests of the child," with the Probate Rules echoing the need for "fairness, accurate fact-finding, and prompt decisions."[29] Second, where the Rules offer no specific guidance, both the CINA and Probate Rules provide "the court may proceed in any lawful manner, including the application of the Civil [and Evidence] Rules, applicable statutes, the Alaska and United States Constitutions or the common law."[30]

There was no prohibition requiring the trial court to ignore the civil commitment statutes and their protections within the CINA case. And in this case, applying such a framework would have advanced the principles that guide courts interpreting CINA rules. Fairness would have been promoted by treating foster youth as deserving of equal attention and review. Accurate fact-finding would have been promoted by adhering to 47.30.700 *et seq.*'s requirements of factually *competent* testimony from mental health professionals.[31] In contrast, Mira's continued hospitalization was based on testimony from clinician who had offered only one therapy session to her (which Mira had declined), and who recalled only with prompting Mira's brief medical hospitalization due to overdose while at North Star Hospital.

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29 CINA R. 1(c); Probate R. 1(c).

30 CINA R. 1(g); Probate R. 1(e). The provisions differ in that the Probate Rules reference the "Evidence Rules," while the CINA Rules do not.

31 *See infra* §II.A. (describing in greater detail the affidavits and testimony required – and from whom – in AS 47.30.700 *et seq.*).

Most importantly, expeditious decision-making and Mira's best interest would be advanced by having all those invested in her placement, care and wellbeing address the necessity of her hospitalization with the benefit of already-appointed counsel. Legal parties to CINA proceedings have a right to weigh in on the placement decisions made by the Department under state law.[32] OCS has an obligation to share all information concerning youth in their care, absent a valid assertion of privilege.[33] Yet, when proceedings are "separate," this flow may be disrupted through duplicate appointments of counsel, disruption to access guardians at litem, and exclusion of intervening parties such as the Indian child's tribe. Such siloed proceedings increase the risk of uncertainty and disarray by laying the groundwork for what would otherwise be collateral attack by a party excluded from one proceeding or another.

Because child placement, care, and mental wellbeing at issue in a civil commitment case are "substantially related" to CINA proceedings, when appointing counsel to represent both the indigent parent(s) and child, as required by AS 47.30.775, conflicts are sure to emerge if the issue of civil commitment is addressed in a separate proceeding.[34] And evaluating and resolving these conflicts will cause further delays, as the Public Defender

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[32] *See* AS 47.10.080(s) (requiring notice to parties of intent to change placement); AS 47.14.100(e) (establishing statutory placement preferences); CINA R. 16, 17, 19.1 (on disposition, and its subsequent review).

[33] CINA R. 8.

[34] *See* R. Professional Conduct 1.7. The Public Defender Agency is charged with representing both respondent parents and guardians and children in CINA cases, as well as in civil commitment cases. AS 18.85.100. The Office of Public Advocacy is charged with representing parents of minor respondents in proceedings under AS 47.30, as well as parents or children when the Public Defender Agency has a conflict of interest. AS 44.21.410.

Agency and the Office of Public Advocacy work to evaluate whether they could provide representation.[35] In this case, appointment of counsel to represent Mira already caused a delay to due process; such delays would only be worse if Mira's mother, too, required appointment of additional counsel in a separate proceeding.

While *guardians at litem* are required to be appointed in cases where youth are placed, voluntarily, by their parent or guardian, there is no such requirement in involuntary commitment proceedings.[36] And, in a separate, involuntary proceeding that is confidential except as to legal parties, the CINA *guardian ad litem* may be deprived of information in what are otherwise confidential probate proceedings.[37] Without access to this critical information, the *guardian ad litem* will be hobbled in performing their duties.[38]

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35 *See Hospitalization of April S.*, 499 P.3d at 1019 (Alaska 2021) (reasoning that due process was provided where an *ex parte* hearing was held prior to appointment of counsel, because "[t]he additional procedures sought would require appointing an attorney for April at the beginning of the *ex parte* inquiry instead of at the end of it, then scheduling a hearing which would also have to include her parents, who themselves would have a right to counsel," which would cause delay in provision of due process through a hearing in the civil commitment case, as it did in a parallel CINA case involving the minor). *See also* State of Alaska, Dep't of Admin., Oversight & Review Unit, Review of the Efficiency and Effectiveness of the Public Defender Agency, Appx. C, at 7-8. (Nov. 4, 2019) *available at* https://doa.alaska.gov/drm/oru/docs/pdareview-11-4-19.pdf (describing the need and process for cautious evaluation of conflicts to comply with professional obligations to clients).

36 *Compare* AS 47.30.690(b) *with* AS 47.30.775.

37 AS 47.30.845 (requiring records pertaining to a civil commitment to remain confidential, with certain exceptions which do not include access to records by a *guardian ad litem*).

38 *See* CINA R. 11.

Taking up the question of a foster youth's hospitalization as a separate matter, distinct from CINA proceedings, is especially damaging for Tribes because it undermines their interests under the Indian Child Welfare Act (ICWA).[39] ICWA's focus is to:

> protect the rights of the Indian child as an Indian and the rights of the Indian community and tribe in retaining its children in its society[] . . . by establishing 'a Federal policy that, where possible, an Indian child should remain in the Indian community,' and by making sure that Indian child welfare determinations are not based on 'a white, middle-class standard which, in many cases, forecloses placement with [an] Indian family.'[40]

When the Senate conducted the hearings that led to the passage of ICWA, it took testimony from and reviewed writing by Dr. Joseph Westermeyer, a Minnesota psychiatrist with extensive experience working with Chippewa families.[41] Dr. Westermeyer testified that "white physicians [and] white psychologists . . . have . . . cultural blinders that . . . impede their work."[42] Mr. Westermeyer provided, as an example, a case where a Native grandmother failed to secure medical treatment for her child, resulting in a referral to a child welfare agency; he observed "[t]he grandmother was merely behaving as a normal Indian grandmother. She loved the girl and was concerned for her welfare; but at fourteen years of age her granddaughter was considered to be a free agent responsible for herself

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39 *See generally* Courtney Lewis, *The Indian Child Welfare Act's Application to Civil Commitments of Indian Children in State Court Proceedings*, 9 Am. Indian L.J. 105 (2020) (addressing the applicability of ICWA to civil commitments of Indian children, generally, not only in the context of CINA).

40 *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 37 (1989) (citing to H. R. Rep. No. 95-1386 (1978) (internal citations omitted).

41 *Indian Child Welfare Program: Hearing before the Subcommittee of Indian Affairs of the Senate Committee on Interior and Insular Affairs* (hereinafter "ICWA Hearings"), 93d Cong. 2d. Sess. 45, 506 (1974) (statement of Dr. Joseph Westermeyer, Department of Psychiatry, University of Minnesota).

42 *Id.* at 48.

and her behavior. And within the limits of her own environment, grandmother was providing as good a home as she could."[43] The risks of imposition of "white, middle-class standards" attendant in the civil commitment of minors, against parents' wishes, are thus clearly implicated in the testimony given to Congress in the passage of ICWA.

The Concerns that gave rise to the due process protections provided by ICWA were also documented in testimony before the Senate Subcommittee on Indian Affairs. Dr. Alan Gurwitt, a child psychiatrist, discussed the pitfalls that Native children and families fall victim to, resulting in family separation:

> [O]ptions available for placement are either not available or are inaccessible for varied reasons, families are disorganized; or are having difficulty in providing for needs of the children; and usually do know well in advance the placement decision. Decisions to place the child often assume that other options have failed, whereas, too often little effort has been made to intervene early with support for the child and his family by the State and Federal agencies and, occasionally, by the tribe. Too often, the only clear option appears to be placement."[44]

These are challenges familiar to the world of civil commitments of minors and CINA, where families may not have the wherewithal or support to meet youths' needs within a mental health system of limited resources. Similarly, in the hearings leading to ICWA's enactment, psychiatric hospitals and other mental health facilities were seen as part of a continuum of restrictive environments in which foster youth were wrongfully placed.[45]

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43 *Id.* at 506 (containing article, Joseph Westermeyer, *Absentee Health Workers and Community Participation*, 62 Am. J. Pub. Health (1972)).

44 *Id.* at 55 (statement of Dr. Carl Mindell and Dr. Alan Gurwitt, child psychiatrists).

45 As the Senate Subcommittee on Indian Affairs heard in 1974 from Dr. Robert Bergman, an Indian Health Service Psychiatrist from Gallup, New Mexico, "it has become accepted not only by the welfare workers but by the parents in general that the best thing to do for any troublesome child is to send him away to a boarding school or a foster home

And so, ICWA gives tribes a right to participate as legal parties in cases where children are involuntarily taken from their family and placed in "institutions;"[46] it also establishes placement preferences that require youth be placed in the least restrictive environment appropriate for their care – with "institutions" dead last.[47] Separating CINA and probate commitment proceedings – even if Tribes somehow receive notice, intervene, and are accepted to a civil commitment case – will at the very least delay the Tribe's participation, depriving the Courts of an important voice, and important cultural context.[48]

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in the first instance of trouble or to reform school, or the State hospital after there are repeated offenses." *Id.* at 129 (statement of Dr. Robert Bergman; accompanied by Dr. George Goldstein, Indian Health Serv., Gallup, N. Mex.). Raymond Butler, then Chief of Division of Social Services and Acting Director of Office of Indian Services, testified to the growth of tribally-operated institutional facilities for youth, and explained that previously, an "Indian child who needed special institutional care could only receive such care in facilities that were located several hundred miles away from the child's home reservation, and as such many Indian parents chose not to place their child in the institutional facility." *Id.* at 448 (statement of Raymond Butler, Acting Director, Office of Indian Services, Chief of Division of Social Services, Washington, D.C.).

46 25 U.S.C. §§ 1903, 1911. Although the Alaska Supreme Court declined to answer the question of whether ICWA applies to involuntary commitment of minors, contrary to their parents' wishes in *In re Gabriella B.*, No. S-17022/17122, 2019 Alas. LEXIS 100, at *8 n.17 (July 3, 2019), the conclusion that ICWA would apply based on the plain language of 25 U.S.C § 1903(1)(i) seems inescapable.

47 25 U.S.C. § 1915(b).

48 See Lewis, *supra*, at 129-131 (addressing the mechanics of ICWA's protections to "emergency" proceedings under 25 USC 1922, and when the notice provisions protections of 25 USC 1912 are triggered). The Court has noted "the need for expert testimony about the prevailing social and cultural standards of the child's tribe is the rule, not the exception," and that "deeming knowledge of tribal culture to be 'plainly irrelevant' based on testimony of an expert without knowledge of tribal culture 'may rest on hopelessly circular logic.' *State v. Cissy A.*, 513 P.3d 999, 1012, 1014 (Alaska 2022) (quoting *In re April S.*, 467 P.3d 1091 (Alaska 2020) (Winfree, J., concurring)). It would not serve to exclude the Tribe from proceedings as the best hope to interrupt the "hopelessly circular logic," in cases where cultural differences and ICWA's placement preferences are at play. *But see In re April S.*, 467 P.3d at 1099 (finding, based on the circumstances of the case, cultural knowledge was not relevant to the question of whether a child's psychiatric needs required hospitalization).

Separate CINA and commitment proceedings, with incomplete sharing of information, would prejudice the Tribe and Mira by depriving legal parties of relevant information and a meaningful opportunity to meet allegations made that Mira's initial and continued hospitalization are necessary. The hearing, applying AS 47.30.700 *et seq.* should have been set, as the Tribe requested, immediately and heard within the CINA proceeding. [Exc. 18-32].

C. AS 47.10.087 Does Not Apply to Mira's Hospitalizations.

The statute applied by the trial court, AS 47.10.087, applies only to children under the custody of the State. It provides that "[t]he court may authorize the department to place a child who is in the custody of the department . . . in a secure residential psychiatric treatment center," provided certain conditions are met.[49] The statute also requires the court to "review a placement made under this section at least every 90 days," allowing that a court "may authorize the department to continue the placement of the child in a secure residential psychiatric treatment center," provided certain requirements are met.[50] As the trial judge observed, AS 47.10.087(a)'s language that the court "may authorize" a placement "would seem to suggest that authorization would need to be made before the child placed there." [Exc. 97-98]. This is accurate, as to reviews of placements at *secure residential psychiatric treatment centers*.

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49 AS 47.10.087(a).
50 AS 47.10.087(b).

However, arguably, neither Sitka Community Hospital nor North Star Hospital are "secure residential psychiatric treatment centers." "Residential psychiatric treatment center" is defined to mean "a secure or semi-secure facility, or an inpatient program in another facility, that provides, under the direction of a physician, psychiatric diagnostic, evaluation and treatment services on a 24-hour-a-day basis to children with severe emotional or behavioral disorders."[51] But the section also defines other, distinct, facilities licensed by the State, including hospitals.[52] These distinct types of licensed facilities are subject to disparate regulations.[53]

Critically, regulations governing residential psychiatric treatment centers require that, in order to be admitted, any patient "does not demonstrate mental, emotional, or behavioral dysfunction that requires acute psychiatric hospitalization."[54] The patients eligible for treatment at a secure residential psychiatric treatment center are mutually exclusive of the patients that require acute hospitalization. Both North Star Hospital and Sitka Community Hospital were used as acute treatment facilities for involuntary treatment. The trial court erred in applying AS 47.10.087 to evaluate Mira's placements at both facilities.

D. *Hooper Bay et al. v. Lawton et al.'s* Preliminary Injunction Does Not Control.

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[51] AS 47.10.990, AS 47.32.900(20)(2020).

[52] AS 47.32.900 (2020).

[53] *Compare* 7 AAC 50.800-885 (governing residential psychiatric treatment centers) *with* 7 AAC 12.215 (governing psychiatric hospitals).

[54] 7 AAC 50.825(d)(2)(C).

While the Department has argued that the preliminary injunction entered in *Hooper Bay* controls; this is only partially true. *See* [Tr. 4, Dec. 30, 2021; Tr. 12, Jan. 7, 2022]. The *Hooper Bay* preliminary statewide injunction prohibits OCS from keeping foster youth at North Star Hospital without an ".087 type of hearing" within 30 days of a child's admission. [R. 60]. The preliminary injunction, while binding on OCS, does not provide a ceiling to the due process protections to which an OCS foster youth could be entitled, especially when that foster youth does not have a relationship to a *Hooper Bay* plaintiff.[55] The legal conclusions drawn in the *Hooper Bay* litigation are without precedential value.[56] More importantly, no reference was made to the injunction by the court in either its oral findings and order on record, or in its written order. [Exc. 41-44, 93-103]. Because the trial court did not rely upon the *Hooper Bay* injunction, it is not at issue in this appeal.

II. Mira's Continued, Involuntary Hospitalization with No Judicial Review Violated Her Rights Under Alaska's Constitution.

The Court has held that "minor[s] ha[ve] 'an interest in an accurate and expedited emergency evaluation and prompt judicial review of [their] emergency detention and evaluation,' and that [their] liberty interest [is] implicated at the moment [they are] involuntarily detained."[57] The Alaska Supreme Court has determined that hospitalizing a

55 Alaska R. Civ. Procedure 65.

56 *Hospitalization of April S.*, 499 P.3d at 1015 (requiring *de novo* review of a trial court's interpretations of law).

57 *Id.* at at 1017 (Alaska 2021) (quoting *In re Hospitalization of Daniel G.*, 320 P.3d 262, 271-72 (Alaska 2014).

person against her will in a locked institution for psychiatric treatment is a "massive curtailment" of liberty and privacy that "begins the moment the respondent is detained involuntarily."[58] The Court has recognized that few things are more personal than control over one's own body,[59] and has held that minors, too, enjoy the fundamental right to privacy that safeguards that control.[60] The Court has also considered the issue and held unequivocally that "the right to choose or reject medical treatment – finds its source in the fundamental constitutional guarantees of liberty and privacy" and that "[t]he constitution itself requires *courts, not physicians*, to protect and enforce these guarantees."[61] It follows that under Alaska's Constitution, Mira has a right to due process to protect against the wrongful, "massive curtailment" of her rights from the moment she was involuntarily detained. The failure to provide *any* process to Mira while she remained involuntarily detained within two separate facilities for 46 days violated both her procedural right to due process, and her substantive right to due process, and her right to equal protection of the law.

A. Depriving Mira of Protections Available to Foster Youth Violates Her Right to Equal Protection.

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[58] *Wetherhorn*, 156 P.3d at 375, 377, 378.

[59] *See, e.g.*, *Myers v. Alaska Psychiatric Inst.*, 138 P.3d 238, 246 (Alaska 2006) (citing *Breese v. Smith*, 501 P.2d 159, 169 (Alaska 1972); *State v. Planned Parenthood*, 171 P.3d 557, 581 (Alaska 2007)).

[60] *Planned Parenthood*, 171 P.3d at 581 – 82.

[61] *Myers*, 138 P.3d at 250 (emphasis added) (rejecting Alaska Psychiatric Institute's argument that so long as doctors made the statutorily-required determination that administering psychotropic medications was in the patient's best interests, there was no need for the court to give further consideration to the issue in deciding whether to authorize nonconsensual treatment.).

In ruling that AS 47.10.087 does not apply to Mira by cabining the court's authority to the CINA statutes, Judge Montgomery questioned, "I don't know why somebody in OCS custody would be entitled to less rights, but that's exactly what AS 47.10.087 does." [Exc.] As described in the analysis of the statutory claims, this needn't be the case. But if Judge Montgomery is correct, then it means that Mira is being denied protections available to all youth, solely by virtue of being in OCS custody. This runs afoul the Alaska Constitution's guarantee that "all persons are equal and entitled to equal rights, opportunities, and protection under the law," a right which is interpreted more broadly under the Alaska Constitution than the federal.[62]

To test whether there has been a violation of equal protection rights, the Court employs "a flexible three-step sliding-scale analysis that considers the individual interest at stake, the government interest served by the challenged classification, and the means-ends nexus between the classification and the government interest."[63]

In this case, the fundamental liberty and privacy interests of the child are readily-established.[64] Moving to the second factor, the State's interest should be in the protection of its most vulnerable youth whom it is charged with caring for in the least restrictive environment.[65] This Court has recognized that, with respect to minors in OCS custody, the

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62 Alaska Const. Art. 1 §1; *Watson v. State*, 487 P.3d 568, 570 (Alaska 2021).

63 *Watson*, 487 P.3d at 570-71 (Alaska 2021) (internal quotations omitted).

64 *Supra* nn.57-61.

65 AS 47.05.065 (stating wards of the state are "entitled to reasonable safety, adequate care, and adequate treatment . . . for the duration of time that the child is award of the state."); AS 47.10.084(a) (imposing on the Department "the responsibility of physical care and control of the child, the determination of where and with whom the child shall live, the right and duty to protect, nurture, train and discipline the child, the duty of providing the

State has a "strong interest, 'in obtaining a prompt psychiatric evaluation of a respondent who has been detained on an emergency basis to determine if civil commitment is warranted' and that evaluation orders [are] necessary for the functioning of a civil commitment system."[66] Applying the third factor, equal protection is not denied when important individual interests are at stake and there is a *close relationship* between the State's interests and the disparate treatment by classification.[67] Applying that factor to this case, there *is no relationship* between the State's disparate classification and their interests in providing care for youth in a least restrictive environment. The robust due process protections being denied to Mira would advance the State's interests, not undermine them.

B. Mira's Right to Procedural Due Process Was Violated.

Analyzing whether adequate due process has been provided, Alaska Courts have looked to the *Mathews v. Eldridge* test in both the civil commitment context, and in relation to CINA cases.[68] In *Mathews v. Eldridge*, the U.S. Supreme Court outlined three factors to be balanced in evaluating the adequacy of procedural due process protections:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function

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child with food, shelter, education, and medical care, and the right and responsibility to make decisions of financial significance concerning the child."); AS 47.14.100(e) (requiring placement of the children in the custody of the Department in the least restrictive environment).

[66] *Hospitalization of April S.*, 499 P.3d at 1018 (quoting *Daniel G.*, 320 P.3d at 272-73).

[67] *Watson*, 487 P.3d at 573.

[68] *In re Jacob S.*, 384 P.3d 758, 764 (Alaska 2016) (civil commitments); *Richard B. v. State*, 71 P.3d 811, 831 (Alaska 2003) (CINA).

involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[69]

Failure to provide *any* process for 46 days stands in contrast to precedent where this court has found that the civil commitment procedures, as they exist, and as they were applied, do not violate youths' right to due process under *Mathews*. In *In re the Necessity for the Hospitalization of April S.*, this Court, applying the *Mathews* test to evaluate the process due to protect the minor's fundamental rights, found that the minor's rights were not violated when the judge, on receipt of a petition by a hospital social worker, and after conduct of an *ex parte* hearing at which testimony of the hospital social worker was taken as to the emergent need for the child's evaluation, issued an *ex parte* order for her evaluation, even though that youth did not yet have counsel.[70] The *April S.* case followed *In re the Hospitalization of Daniel G.*, where this Court similarly applied the *Mathews* test to determine that the minor's rights to due process were not violated when he was subject to emergency detention procedures and an *ex parte* order was issued as to his evaluation.[71] In *Daniel G.*, the minor was transported to Providence Hospital by a police officer pursuant to AS 47.30.705; within seven hours, a "disinterested medical staff" filed a petition for evaluation, detailing Daniel's condition, as required in AS 47.30.710; an *ex parte* order was issued, authorizing Daniel's transfer to API for a period not to exceed 72 hours within an hour of receipt by the court; and Daniel was admitted to API the same day.[72] A hearing

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69 *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).
70 *Hospitalization of April S.*, 499 P.3d at 1018-19.
71 *Daniel G.*, 320 P.3d at 273.
72 *Id.*, 320 P.3d at 264-65.

on a 30 day commitment, though scheduled in a timely manner, was vacated because the minor was discharged by the hospital, as not requiring hospitalization.[73] Both of these cases, after recognizing youth have fundamental liberty interests, analyzed whether constitutional rights were violated when AS 47.30.700 *et seq. were* followed. Applying the *Mathews* test to this case yields a different result.

The fundamental liberty interests of youth in not being confined being clearly established,[74] we turn out of order to the third *Mathews* factor – the State's interests and administrative burdens of a due process regime. The State's interests in foster youth are much the same as in the equal protection analysis,[75] so we move to burdens. As observed by the Court in *April S.*, implementing the protections promised through AS 47.30.700 *et seq.* is not onerous – "[a]n OCS social worker, like any other interested individual, may file a petition for involuntary commitment."[76] In contrast, the plain language of AS 47.10.087(a), requiring court authorization to place a child, does not serve these interests. And, CINA parties already have a right to contest or review placement changes.[77] The burdens imposed by applying the framework of AS 47.30.700 *et seq.* to the involuntary hospitalization of foster youth are not onerous, and do not impede the State's interests in foster youths' care. In contrast, to require a pre-admission review in the case of an

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73 *Id.*, 320 P.3d at 265.
74 *Supra* nn.57-61.
75 *Supra* § II.A.
76 *Hospitalization of April S.*, 499 P.3d at 1020.
77 AS 47.10.080(s) (requiring advanced notice of non-emergency change of placement to parties, and providing for review of the transfer). *See also*, CINA R. 19.1 (providing for review of placement transfer).

emergency would threaten OCS's ability to fulfil its duties to the children in its custody, by delaying evaluation and treatment.

But focusing on the *Mathews* second factor – "the risk of an erroneous deprivation of [liberty interests] through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards"[78] – begs the question: what procedures *were* used? None initiated by the State. Assuming some set of statutes applied, those statutes are unconstitutional as applied in this oft-repeated factual scenario.[79] But, as described, neither AS 47.10.087 nor AS 47.30.700-815 were faithfully applied. There was no pre-hospitalization hearing for the court to "authorize" a prospective placement, as required in AS 47.10.087. There was no *ex parte* petition, nor any order to detain or transport Mira, nor any hearing held within 72 hours of her evaluation to determine the necessity of her hospitalization, nor within 30 days of her hospitalization as would have been required in AS 47.30.700-815. No careful reasoning is needed to balance the complete lack of process provided to Mira over the full *one eight of a year* during which she was confined against the probable value of *any review at all* and the *possibly* countervailing interests of the State. Her rights to procedural due process were violated.

Finding that 46 days of confinement without even cursory review is inadequate due process does not answer the question of what process would have been satisfactory. This

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78 *Mathews*, 424 U.S. at 335.

79 *See State v. ACLU of Alaska*, 204 P.3d 364, 372 (Alaska 2009) ("A holding that a statute is unconstitutional as applied simply means that under the facts of the case application of the statute is unconstitutional. Under other facts, however, the same statute may be applied without violating the constitution.")

Court, faced in other circumstances with a void of law on an important constitutional right in a CINA case, has looked to the civil commitment statutes for guidance, before prescribing procedures that would protect families' fundamental rights. In *Kiva O. v. Department of Health and Social Services, Office of Children's Services,* the Court recognized parents' fundamental right to make medical decisions for their children, and prescribed a framework to analyze when their right to consent to the administration of psychotropic medications to their children may be overridden, consistent with due process.[80] Not only that, but the Court recognized the "necessity that judicial decision-making be fully informed about the patient's therapeutic progress, changes in the parent's perspective, and the development of any available less intrusive treatments," and looked to the analogous statutes in AS 47.30 for guidance on subsequent review of such court-ordered administration of psychotropic medications.[81] From there, the Court ordered that when parental consent is overridden, review of court-ordered medications must be reviewed every 90 days.

If this Court finds the statutory schemes discussed – AS 47.10.087 or AS 47.30.700 *et seq.* to be constitutionally infirm, it has the power to prescribe a solution, to give guidance to lower courts. But, in its analysis, this Court can look to existing statutes as possible templates. Comparing the two possible schemes considered by the trial court shows the real value that might accrue from applying the framework of AS 47.30.700-815,

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[80] *Kiva O. v. Dep't of Health & Soc. Servs., Office of Children's Servs.*, 408 P.3d 1181, 1186-90 (Alaska 2018).

[81] *Id.* at 1195.

rather than AS 47.10.087(a). The overarching difference between the two schemes is timing, and triggering events for various protections, with AS 47.30.700 *et seq.* being more protective at every step.

The differences between the two schemes emerge immediately, in the type of information to be provided to the court to trigger an initial review, by whom, the timing of any hearing, and when and how counsel is appointed. AS 47.10.087(a) contemplates a hearing prior to a foster youth's placement in a secure residential psychiatric treatment facility, with testimony given by a mental health professional. Under AS 47.10.087, the initial hearing to authorize placement requires testimony from a mental health professional that:

> (1) the child is gravely disabled or is suffering from mental illness and, as a result, is likely to cause serious harm to the child or to another person;
> (2) there is no reasonably available, appropriate, and less restrictive alternative for the child's treatment or that less restrictive alternatives have been tried and have failed; and
> (3) there is reason to believe that the child's mental condition could be improved by the course of treatment or would deteriorate if untreated.[82]

While CINA Rule 12.1 will soon require the appointment of an attorney to represent a child who does not consent to their placement in a residential facility, the mechanisms and timing of that appointment require that *someone* alert the court of the need for counsel.[83]

In contrast, preliminary review of an involuntary hospitalization, and appointment of counsel is to happen promptly within the civil commitment statutes. Whether filed by

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82 AS 47.10.087(a).
83 *See* Alaska Supreme Court Order 1978 (Apr. 13, 2022) (adopting new CINA R. 12.1 effective Oct.17, 2022)

"any adult" in advance of any emergency examination, or after-the-fact by a mental health professional who has already performed an emergency examination, a petition specifying the "factual information" on which a belief that a person presents "a likelihood of serious harm to self or others or is gravely disabled ~~as ae result of mental illness~~" must be filed with the court in civil commitments.[84] The petition must include the names and contact information of individuals with factual knowledge based on personal observation – allowing the respondent, their parent, and any other interested party a fair opportunity to challenge the assertion.[85] Upon arrival to an "evaluation facility," an individual must be evaluated by both a physician and a mental health professional within 24 hours; if presenting to a crisis stabilization center, the review must only be completed by a mental health professional, but within three hours.[86] A judge may not order detention for the purpose of evaluation without finding probable cause, and "provid[ing] findings on which the conclusion is based," and, must immediately appoint counsel to represent the subject of the petition.[87]

Had the procedures of AS 47.30.700-710 been followed, requiring even the most minimal of prompt reviews, Mira may have been discharged from Sitka Community Hospital immediately upon being medically cleared, within hours of her initial presentation. [Exc. 30]. Her discharge would have been guaranteed, in the first place, through the inability of a mental health professional to swear to the allegations required in

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[84] AS 47.30.700, AS 47.30.710(b)(2020).
[85] AS 47.30.700(b)(2020).
[86] AS 47.30.700(a)(2020).
[87] *Id.*.

an *ex parte* petition. The trial court might have benefitted from specific information on her behavior and diagnoses at the time of her hospitalization, rather than conflicting accounts, passed along not through any mental health professionals, but from caseworkers who in turn relied upon reports from others after returning from leave. [Exc. 25-26, 28, 30]. And, Mira would have benefitted from appointment of counsel immediately with the issue of an *ex parte* order. In contrast, under AS 47.10.087, there is no requirement for appointment of counsel, and even where there is a right to counsel, it falls to a legal party to alert the court to the need. OCS did not even notify parties of Mira's hospitalization until 10 days after she was hospitalized, through a form-letter *Delayed Notice of Change in Placement*, alerting parties only to the need for a presumably short hospitalization for medical stabilization "due to drinking alcohol." [Exc. 25]. As a result of this failure to communicate, Mira was only appointed counsel on day 24 of her hospitalization. [Exc. 33].

The differences between the two schemes continue as courts perform continued review. Under AS 47.10.087, no subsequent review is required until 90 days after an initial hearing to authorize placement at a secure residential psychiatric treatment center, at which point continued placement may only be authorized:

> if the court finds, based on the testimony of a mental health professional, that the conditions or symptoms that resulted in the initial order have not ameliorated to such an extent that that child's needs can be met in a less restrictive setting and that the child's mental health condition could be improved by the course of treatment or would deteriorate if untreated.[88]

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88 AS 47.10.087(b).

No standard of evidence is given, nor is there any explicit requirement that the "mental health professional" offering testimony has any specific knowledge of the youth in question. This means that a child can remain in a facility for three months before any additional evidence is put before a judge as to whether such restriction is necessary.

In contrast, the civil commitment statutes require progressively more rigorous reviews after an initial screening, with an emphasis on timely, prompt evaluation and review, while continuing to encourage and offer patients the option of continuing treatment on a voluntary basis.[89] Upon receipt of an order for evaluation, the facility must accept the individual for a period not to exceed 72 hours, during which period the court must set a hearing to determine whether commitment for a period of 30 days will occur.[90] If it is believed that a commitment of up to 30 days is necessary, within the 72 hour period another petition must be filed, "signed by two mental health professionals who have examined the respondent, one of whom is a physician."[91] The petition must, among other things

> (1) allege that the respondent is mentally ill and as a result likely to cause harm to self or other or is gravely disabled; (2) allege that the evaluation staff has considered but has not found that there are any less restrictive alternatives available that would adequately protect the respondent or others . . . (6) list the prospective witnesses who will testify in support of commitment or involuntary treatment; and (7) list the facts and specific behavior of the respondent supporting the allegation (1)."[92]

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[89] *See, e.g.*, AS 47.30.730(5) (requiring petition for 30 day commitment to allege that patient has been "advised of the need for, but has not accepted, voluntary treatment); AS 47.30.803 (permitting conversion of an involuntary commitment, to a voluntary commitment).

[90] AS 47.30.715(2020).

[91] AS 47.30.730(a)(2020).

[92] *Id.*

At the hearing on a 30-day commitment, the respondent has a host of enumerated rights, including the right to examine reports and petition's within the court's file, and to "have the rules of evidence and civil procedure applied so as to provide for the informal but efficient presentation of evidence."[93] A respondent will not be ordered committed unless the court finds "by clear and convincing evidence, that the respondent is mentally ill and as a result is likely to cause harm to the respondent or others or is gravely disabled."[94]

Imagining that these procedures had been followed in Mira's case, *Mira's treating physician* and another mental health professional *who had examined her*, would have already given notice to the parties through a petition of the issues Mira was facing – if, indeed, she was facing any issues within 72 hours of her admission to Sitka Community Hospital. [Exc. 30] The petition itself would have required that there be an indication that a less restrictive alternative was considered, with an implicit demand that such a less restrictive environment be sought. Instead, testimony showed that applications to less restrictive alternatives were only sought once Ms. Meppen requested the applications be made, a week before Mira's hearing, approximately 37 days into Mira's hospitalization. [Exc. 56-57]. Or, Mira would have been released; it remains unclear how long Mira's hospitalization persisted solely due to the fact that her prior foster parent would not accept her back in to the home – and how her lengthy period of confinement without judicial review impacted her mental health and behavior. [Exc. 30]. At the hearing that eventually would occur regarding her hospitalization, where the rules of evidence could apply, she

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93 AS 47.30.735(b).
94 AS 47.30.735.

could demand testimony from someone *competent* to speak to her diagnoses; significant incidents while in care; and her wellbeing. Instead, Ms. Mims was nearly unfamiliar with Mira – for whom she had offered only one therapy session, which Mira declined – and lacked any resources to refresh her suspect recollections. [Exc. 58, 61].

In order for a hospitalization to continue past the initial 30 days of commitment, another petition may be filed to authorize an additional 90-day commitment,[95] this time signed by the "professional person in charge" of a facility, containing the same information as required in a petition for a 30 day commitment, but that the 90 day petition must also:

> (1) allege that the respondent has attempted to inflict or has inflicted serious bodily harm upon the respondent or another since the respondent's acceptance for evaluation, or that the respondent was committed initially as a result of conduct in which the respondent attempted or inflicted serious bodily harm upon the respondent or another, or that the respondent continues to be gravely disabled, or that the respondent demonstrates a current intent to carry out plans of serious harm to the respondent or another;
> (2) allege that the respondent has received appropriate and adequate care and treatment during the respondent's 30-day commitment;
> (3) be verified by the professional person in charge, or that person's professional designee, during the 30-day commitment.[96]

The hearing itself, for a 90 day commitment, differs from a 30 day commitment in that the respondent may request a trial by a jury of six people; and, may "retain an independent licensed physician or other mental health professional to examine the respondent and to testify on the respondent's behalf," with the court paying the reasonable fees of an appointed physician or mental health professional appointed to independently examine an

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[95] AS 47.30.740.

[96] AS 47.30.740(a).

indigent respondent.[97] As with a 30 day commitment, the court cannot order a 90 day commitment without finding "clear and convincing evidence that the respondent is mentally ill and as a result is likely to cause harm to self or others, or is gravely disabled," and may order treatment in a less restrictive setting.[98]

At Mira's 90-day commitment hearing, should one have been held, the professional person in charge would have had to petition the court to specifically allege that Mira – at any point – attempted to inflict or had inflicted serious bodily harm on herself or others. Instead, Ms. Mims testified that Mira had "postured" her peers, without engaging in any actual aggression or self-harm. [Exc. 65]. The petition would have required that individual to allege that Mira had received appropriate care while at North Star Hospital. Instead, Ms. Mims had to be reminded of an event in which Mira had consumed hand sanitizer in sufficient quantity that she had to be taken to the emergency room of a different hospital, while under North Star Hospital's "closest" supervision level.[99] [Exc. 62-63, 66-68].

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97 AS 47.30.745.

98 AS 47.30.755.

99 A number of news reports have brought to light issues at the facility which suggest close scrutiny is required. *See, e.g.* Michelle Theriault Boots, *Federal inspectors fault assaults, escapes, improper use of locked seclusion at North Star Hospital*, Anchorage Daily News (Sept. 30, 2022), https://www.adn.com/alaska-news/2022/09/28/federal-inspectors-fault-assaults-escapes-improper-use-of-locked-seclusion-at-north-star-youth-psychiatric-hospital/ (detailing recent investigation findings by the Center for Medicaid and Medicare Services, described *infra*, and relaying the experiences of youth who endorse that the investigation findings mirror their own experiences at North Star Hospital); Michelle Theriault Boots, *Patient escapes and damage reported at North Star youth psychiatric hospital over the weekend*, Anchorage Daily News (Oct. 4, 2022), https://www.adn.com/alaska-news/anchorage/2022/10/04/patient-escapes-and-damage-reported-at-north-star-youth-psychiatric-hospital-over-the-weekend/ (detailing the escape of several youth from North Star Hospital); Michelle Theriault Boots, Alaska families say their children were sexually abused at North Star psychiatric hospital, Anchorage Daily

In short, the procedural protections of AS 47.30.700-815, had they been applied, should have resulted in an entirely different outcome, as evidenced by OCS's own admission that Mira was ready for discharge on day one, with her clinician recommending a return to a foster home, with supports. [Exc. 30]. Though it is unknown precisely what harm her involuntary commitment, without any judicial review, may have done to her stability and wellbeing, the Alaska Constitution and Alaska's commitment statutes are intended to safeguard liberty and to protect all Alaskans – adults and children, in and out of state custody – from the harms inflicted by unnecessary confinement in psychiatric facilities.

AS 47.30.700 *et seq*. allows the State to immediately address crises, but provides critical safeguards for youth's fundamental private interest in their own liberty, with due process protections becoming more rigorous as time goes on. Applying this framework would appropriately balance interests under the *Mathews* test. And, the court should implement this framework moving forward.

C. Mira's Substantive Due Process Rights Were Violated

News (Oct. 11, 2022) *available at* https://www.adn.com/alaska-news/anchorage/2022/10/11/two-alaska-families-say-the-children-they-sent-to-north-star-were-sexually-abused-at-the-psychiatric-hospital/ (relaying the experience of two families whose children were sexually abused while at North Star Hospital). In addition, government investigations revealed deficiencies at the facility. Dep't of Health & Human Servs., Ctr. for Medicaid & Medicare Servs., Statement of Deficiencies & Plan of Correction, North Star Hospital (04/08/2022) *available at https://qcor.cms.gov/hosp_cop/024001ZX8G11CVisit1.html* (detailing, *inter alia*, patients going for 40 days without receiving individual therapy, a youth being discharged at her mother's insistence due to physical injuries suffered at North Star Hospital which were not reported to her).

An attempt to draw comparisons within Alaska's jurisprudence regarding civil commitments finds poor matches, because in each case, the due process protections available exceeded that which Mira was afforded. But, each suggest that Mira's complete lack of judicial review throughout a continuous 46-day period of involuntary hospitalization is anathema to Alaska's notions of liberty, privacy, and due process. These substantive due process protections are all the more critical should the court find a regulatory void surrounding the "undesignated" treatment facilities utilized by OCS.

In *In the Matter of the Hospitalization of Mabel B.*, the Alaska Supreme Court found that the substantive due process of two adults were violated under both the Alaska Constitution, and the less-protective U.S. Constitution when they were held on *ex parte* orders for transportation to an evaluation facility for over two weeks prior to actually being transported.[100] The Court observed "substantive due process focuses on the result of governmental action, not its procedures," and "imposes limits on what a state may do regardless of what procedural protection is provided."[101] The Court applied a "reasonable relation" test finding that the length for which they were detained bore no reasonable relation to the exclusive purpose of the *ex parte* orders – which was that the two women be transported, in order to then be evaluated.[102] The Court went on to criticize the lengthy delay in transporting the two adults pursuant to the *ex parte* order issued by the Court:

> The State . . . used these orders to detain the respondents for almost six times as long as the evaluation period. The respondents' detentions before the

100 *Mabel B.*, 485 P.3d 1018 (generally). *See also Myers*, 138 P.3d at 245 (Alaska 2006) (noting Alaska's "constitutional guarantee of individual liberty [is] more protective).
101 *Mabel B.*, 485 P.3d at 1024 (citations omitted).
102 *Id.* at 1026 (citations omitted).

> evaluation were nearly as long as the commitment for treatment that could be ordered at the end of the evaluation. The State's only explanation for the length of respondents' pre-evaluation detentions was API's lack of capacity, which is an insufficient justification in this case.[103]

Mabel B.'s "reasonable relation" test is challenging to apply to this case in light of the complete inaction by OCS to seek any review of Mira's hospitalization, under any scheme at all. Mira's case offers no narrow "purpose" for the State's action. Cynically, the interest advanced by the State through its *inaction* is in curtailed and delayed judicial review to preserve, as an option, a hospital as a placement of last resort when no foster home can be found, consent and medical necessity notwithstanding.[104] There was no "reasonable relation" between OCS's obligations to provide for Mira's care in the least restrictive environment that could meet her needs and OCS's decision to continue Mira's hospitalization after her clinician at Sitka Community Hospital had cleared Mira for discharge on December 3, 2021. [Exc. 30]. There was no "reasonable relation" between OCS's interest "in obtaining a prompt psychiatric evaluation of a respondent who has been detained on an emergency basis to determine if civil commitment is warranted,"[105] and OCS's decision, made at least a week in advance of Mira's transfer, to continue her hospitalization at North Star Hospital, without providing notice of this transfer to the legal parties or the court, facilitating contact between Mira and her *guardian ad litem*, or seeking any review. [Exc. 77; Tr. 8, Dec. 30, 2021].

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103 *Id.*

104 *But see id.* (finding "lack of capacity . . . is an insufficient justification" for delay in transporting a respondent to a facility for evaluation under AS 47.30.700).

105 *Daniel G.*, 320 P.3d at 272-73.

The tidy comparison that can be drawn between the violation of substantive due process in *Mabel B.* and this case is that Mira's detention, without even the cursory review demanded in an *ex parte* order, and without any hearing, lasted *fifteen times* the length of the statutory evaluation period of 72 hours; the detentions pursuant to court order in *Mabel B.* lasted three times the evaluation period. The length of Mira's detention is five times worse in duration than *Mabel B.*. But it is infinitely worse in that in contrast to the respondents in *Mabel B.*, Mira was afforded no preliminary review through a timely *ex parte* petition and order, and provided no advocate through appointment of counsel until day 24 of her hospitalization.

CONCLUSION

Mira's continued, involuntary hospitalization was unwarranted within the first hours of her evaluation at Sitka Community Hospital. Her continued hospitalization, and planned transfer to North Star Hospital without the benefit of appointed counsel or any judicial review for 46 days reflects a failure to apply *any* statutory scheme meant to protect foster youth or the general public. The lengthy delay also presents a failure to provide substantive or procedural due process to a foster youth in great need of protection through judicial oversight.

The failure of courts to require facilities like Sitka Community Hospital and North Star Hospital to adhere to Alaska's detailed civil commitment statutes has created a *de facto* loophole that allows the Office of Children's Services, licensed hospitals, and licensed psychiatric hospitals to evade Alaska's protective commitment statutes. Alaska

Native foster children, one of Alaska's most vulnerable groups, should receive more, not less, protection.

The Tribe requests that this Court vacate the order entered by the Superior Court, authorizing Mira's placement at North Star Hospital under AS 47.10.087(a). The Tribe asks that this court find that the proper framework to analyze Mira's continuous hospitalization should have been AS 47.30.700 *et seq.*, or, in the alternative, prescribe the proper framework for prompt review of her hospitalization in a manner that will ensure expedient notice of accurate facts surrounding need for hospitalization to all legal parties to the CINA proceeding; prompt appointment of counsel; and competent, timely testimony on the need for continued hospitalization consistent with Alaska's constitutional guarantees of liberty and equal protection under the law.

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